**YE YU**

**v.**

**JOSEPH RAYMOND MORAIS**

HIGH COURT MALAYA, MALACCA
WAN YAHYA J
[CIVIL SUIT NO. 139 OF 1976]
21 MAY 1984

***CONTRACT:*** *Agreement for sale of land - Agreement for rescission by mutual consent - Whether agreement rescinded.*

***AGENCY:*** *Undisclosed principal - Right to sue - Section 184, Contracts Act - Exceptions - Whether any applicable - Ratification - Whether possible - Relationship of principal and agent - Existence of.*

On 18 November 1974, an agreement for the sale of two pieces of land was entered into between the defendant and his mother (now deceased) on the one hand, and one Yamkubar @ Gopal s/o Vythilingam on the other. One of the terms of the agreement was that the agreement could be cancelled by mutual consent and the deposit returned to the buyer. On 24 March 1975, the defendant wrote a letter to Yamkubar advising him of rescission of the contract. On 20 June, Yamkubar entered a caveat against the land. On 22 April 1976, the plaintiff sent a notice to the defendant, claiming, *inter alia*, that Yamkubar was the plaintiff's agent and requesting the defendant to execute the transfer to him. On the defendant refusing to comply, the plaintiff brought the present action against him.

**Held:**

**[1]** The defendant was not entitled to rescind the agreement. There had been mutuality in the issue and therefore the defendant was plainly wrong in taking the unilateral act of rescission.

**[2]** An undisclosed principal may sue on the contract entered into by his duly authorised agent. If an agent incorrectly represents that he is not acting as anybody's agent or that he is an agent for a particular principal, then the other contracting party may rescind the contract, but mere non-disclosure that he is an agent does not amount to misrepresentation and will not exclude the principal from suing.

**[3]** Yamkubar was not the agent of the plaintiff, with authority to contract on the latter's behalf.

(a) Yamkubar was not an agent by ratification. The doctrine of ratification did not apply since disclosure to the effect that Yamkubar was acting as an agent on behalf of a principal was neither indicated in the language of the agreement, orally or by conduct of the parties.

(b) No principal and agent relationship existed between Yamkubar and the plaintiff at the time of the formation of the sale and purchase agreement. The relationship of principal and agent can only be established by the consent of the principal and the agent. There was, however, no evidence of any agreement, written or oral or by conduct, of the existence of such a relationship between Yamkubar and the plaintiff. In fact, their conduct was consistent with that of a relationship of parties in an assignment of contract.

*[Action dismissed with costs.]*

**Cases referred to:**
*Dyster v. Randall and Sons [1926] 1 Ch 932*
*Basma v. Weeks & Ors. [1950] AC 441*
*Montagu v. Forwood [1893] 2 QB 350*
*Greer v. Downs Supply Co. [1927] 2 KB 28*
*Collins v. Associated Greyhound Racecourse Ltd. [1930] 1 Ch 1*
*Garnac Grain Co. Inc. v. HMF Faure & Fairclough Ltd. [1968] AC 1130*

**Legislation referred to:**
Contracts Act 1950, s. 184.

*For the plaintiff - Atma Singh Gill; M/s. Gill & Tang*
*For the defendant - F.H.D'Cruz; M/s. Tay Leong Siak & Co.*

**JUDGMENT**

**Wan Yahya J:**

On 18 November 1974 one Joseph Raymond Morais, defendant in this case and Mrs. C.G. Morais (now deceased), both administrators of the estate of C.G. Morias entered into an agreement for the sale of two pieces of land to one Yamkubar @ Gopal s/o Vythilingam. The terms of the agreement written in somewhat layman's language reads as follows:

(A) There is no time limit to the period when this sale is to be completed, but all attempts will be made to bring this transaction to its conclusion when it is legally possible to do so.

(B) This deposit of RM500 will be forfeited and this agreement declared null and void and not binding

(i) should the buyer not wish to continue this transaction to its completion.

(ii) should the buyer be unable to pay the balance of RM4,500 when the transfer forms are completed and required to be signed.

(iii) if the buyer cannot be contacted after all attempts have been made to contact him. Notice of this sale will be sent through the post to the buyer and if necessary published in the major newspapers of the three main languages. A waiting period of two months will be given after the second publication of notice before this contract is declared null and void.

(C) This agreement could be cancelled and declared not binding through mutual consent and the deposit returned, without any interest to the buyer concerned."

On the same day the parties also drew up another document which they referred to as an agreement but, which appeared to me more like a letter of consent from the Moraises for Yamkubar to enter and enjoy the use of the land for a period of not more than three months. There were different accounts as to the actual purpose of this document but this seems quite unimportant in determining the issues in this case. Mrs. Morias passed away and some time after that, on 24 March 1975, the defendant who was the sole surviving administrator caused a letter to be written to Yamkubar advising him of the rescission of the agreement and requesting Yamkubar to collect the refund of deposit. Between 24 March 1975 and 2 June of the same year, there followed further exchange of letters between the parties' solicitors, the contents of which imply that the proposed rescission was an unilateral act of the defendant. On 14 June 1975 solicitor for Yamkubar finally wrote to the defendant objecting to the rescission and on 20 June 1975 a caveat was entered by Yamkubar.

A year silently slipped by without a word from either party. Then on 22 April 1976 out of the blues there came from another solicitor acting for the plaintiff, a notice which *inter alia* claimed that Yamkubar was plaintiff's agent and requesting the defendant to execute the transfer to him. The defendant refused to comply and so on 16 June 1976 the present suit was filed. During the course of the hearing the plaintiff produced a statutory declaration in which Gopal acknowledged the plaintiff as his principal.

There appeared to be only three issues raised in the pleadings:

(i) whether at the time of signing the agreement Yamkubar was an agent and had the authority to contract on behalf of the plaintiff;

(ii) whether an undisclosed principal can intervene and enforce the transaction signed by his agent; and

(iii) whether under the terms of the agreement the defendant is entitled to rescission.

Looking at the issues in retrogressive order I am satisfied from the letters passing between the parties that Yamkubar had not agreed to the rescission of the agreement at any time. He made an explicit and immediate denial to such suggestion the moment he received the defendant's written offer to terminate the agreement and to return the deposit with interest and compensation. In his examination-in-chief the defendant made no mention about obtaining Yamkubar's consent to terminate the agreement except by way of a short reference in terms that he had put an end to the agreement because the beneficiaries decided to act under clause 'C'. This clause which was reproduced earlier relates to rescission by mutual consent. However, the defendant did say so during his cross-examination but even then he offered no further information as to the time, the place or the circumstances of his obtaining the alleged oral consent. It is my finding that there has been no mutuality in this issue and therefore the defendant was plainly wrong in taking this unilateral act of rescission.

The second issue is clearly a question of law. The right of undisclosed principal to sue on the contract entered into by his duly authorised agent is spelled out in s. 184 of the Contracts Act as follows:

> If an agent makes a contract with a person who neither knows, or has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.
>
> If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

It is an established law that an undisclosed principal can sue on the contract of his agent for the purchase of land. See *Dyster v. Randall and Sons* [1926] 1 Ch 932 and that an agent who contracted in his own name did not cease to be contractually bound. See *Basma v. Weeks & Ors.* [1950] AC 441. An undisclosed principal may intervene on the contract of his agent if it can be shown that the agent has been permitted by the principal to hold himself out as a principal. See *Montagu v. Forwood* [1893] 2 QB 350 at 355. But there are certain situations when an undisclosed principal is excluded from intervening in the contract by express or implied term in the contract itself i.e. when the personality of the agent is relevant. See *Greer v. Downs Supply Co.* [1927] 2 KB 28 and *Collins v. Associated Greyhound Racecourse Ltd.* [1930] 1 Ch 1 or when the contract is unassignable.

If an agent incorrectly represents that he is not acting as anybody's agent or that he is an agent for a particular principal then the other contracting party may rescind the contract but mere non-disclosure that he is an agent does not amount to misrepresentation and will not exclude the principal from suing. See *Dyster v. Randall and Sons* (*supra*). On this issue my finding is in favour of the plaintiff.

The last issue and the one remaining to be considered is whether Yamkubar was the agent with authority to contract on behalf of the plaintiff. This issue, called into question in the very first paragraph of the defence itself, involves the examination and evaluation of relevant circumstances alluding to the agent and principal relationship. As we are aware agency may be created:

(i) expressly i.e. by deed, written or oral appointment or

(ii) impliedly i.e. from conduct and situation of the parties or

(iii) by ratification.

Agency by ratification was not pleaded by the plaintiff in his statement of claim and neither was it raised as such at the trial but even if he did so and the statutory declaration sworn some 18 months after the agreement was entered into was to be considered as an act of ratification, the doctrine of ratification by principal will not apply since disclosure to the effect that Yamkubar was acting as an agent on behalf of a principal was neither indicated in the language of the agreement, orally or by conduct of the parties. The following passages taken from the House of Lords judgment of *Keighley, Maxsted & Co. v. Durant* (*carrying on business as Bryan Durant & Co.*) AC 240 illustrates this principle. At p. 247 Lord Macnaghten summarised the rule governing undisclosed principal and ratification as follows:

> Does the fiction cover the case of a person who makes no avowal at all, but assumes to act for himself and for no one else? If Tindal CJ's statement of the law is accurate, it would seem to exclude the case of a person who may intend to act for another, but at the same time keeps his intention locked up in his own breast; for it cannot be said that a person who so conducts himself does assume to act for anybody but himself. But ought the doctrine of ratification to be extended to such a case? On principle I should say certainly not. It is, I think, a well-established principle in English law that civil obligations are not to be created by, or founded upon, undisclosed intentions.

Further down the judgment at p. 251 Lord James of Hereford said:

> Doubtless a person can confirm and ratify a contract which was in fact made on his behalf. But an undisclosed principal must exist at the time of the contract. He cannot be brought into life as a principal after the contract has been made without any recognition of his existence. No doubt a third person, by agreement with one of the principals, may, as between those two persons, take an interest in the contract; but that subsidiary contract does not create any privity between the third person and the other principal to the original contract.

This was followed by Lord Davey at p. 256 as follows:

> My Lords, I cannot agree. There is a wide difference between an agency existing at the date of the contract which is susceptible of proof, and a repudiation of which by the agent would be fraudulent, and an intention locked up in the mind of the contractor, which he may either abandon or act on at his own pleasure, and the ascertainment of which involves an inquiry into the state of his mind at the date of the contract. Where the intention to contract on behalf of another is expressed in the contract, it passes from the region of speculation into that of fact, and becomes irrevocable. In what sense, it may be asked, does a man contract for another, when it depends on his own will whether he will give that other the benefit of the

> contract or not? In the next place, the rule which permits an undisclosed principal to sue and be sued on a contract to which he is not a party, though well settled, is itself an anomaly, and to extend it to the case of a person who accepts the benefit of an undisclosed intention of a party to the contract would, in my opinion, be adding another anomaly to the law, and not correcting an anomaly.

The remaining fact to be determined is whether at the formation of the sale and purchase agreement the principal and agent relationship existed between Yamkubar and the plaintiff by any agreement written or oral. Yamkubar, as alleged by the plaintiff in his evidence, died in 1977 or 1978. Therefore the only source of evidence available to the plaintiff is Yamkubar's statutory declaration and the plaintiff's own testimony. I shall consider these in relation to the conduct of the parties for my factual conclusion.

The law relating to the creation of agency relationship was lucidly expressed by Lord Pearson in the House of Lords case of *Garnac Grain Co. Inc. v. HMF Faure & Fairclough Ltd.* [1968] AC 1130 at 1137:

> The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it, as in *Ex parte Delhasse*, 7 Ch D 511. But the consent must have been given by each of them, either expressly or by implication from their words and conduct. Primarily one looks to what they said and did at the time of the alleged creation of the agency. Earlier words and conduct may afford evidence of a course of dealing in existence at that time and may be taken into account more generally as historical background. Later words and conduct may have some bearing, though likely to be less important.

With these guiding words in mind I shall proceed to examine the oral and documentary evidence. The statutory declaration of Yamkubar was sworn on 9 April 1976 i.e. one and a half years after the agreement was first entered into and after numerous communications between him and the defendant. The copy which was tendered in Court was uncertified and therefore did not reveal any authentic value. Nevertheless for what it is worth, I shall consider its implication, if any. At no time did Yamkubar's solicitor indicate in his letters (Exhibit AA8 and AA11) that he was acting as an agent. Even at the time of filing the caveat on the disputed land Yamkubar's own statement contained no disclosure indicating that he had entered into the agreement as an agent. Even assuming for a moment that Yamkubar was the plaintiff's agent and for some unknown reason he wished to conceal his identity from the defendant, I cannot appreciate on the statutory declaration as in Exhibit A7 could not be made earlier at the time of entering into the agreement or shortly thereafter. Apart from plaintiff's own verbal assertion in Court there is no evidence to indicate the existence of this principal and agency relationship. On the contrary the earlier documents and letters written by Yamkubar's previous solicitor, to my mind import the very opposite inference to be drawn.

The only other and indeed the main evidence on which the plaintiff rests his case is the oral testimony of the plaintiff made from the witness box. In substance he evinced that he became acquainted with Yamkubar at Segamat New Village some time in 1974. At a later period when he was residing in Seremban he met Yamkubar and the latter informed him about the land. He said Yamkubar told him the purchase price was RM5,000 out of which RM500 representing 10% of the purchase price was to be paid as deposit. He claimed that Yamkubar acted throughout this transaction as his agent and that he provided the RM500 which Yamkubar paid to the defendant as deposit payment. The relevant part of his evidence reads as follows:

> According to Gopal (Yamkubar) the land belonged to one Mr. Morais. The purchase price of the land was RM5,000. Gopal told me this. His told me that I have to pay 10% deposit money. At first I asked Gopal to go to the lawyer's office to do the agreement but he told me Morais' son was a teacher and he could do the agreement himself. Mrs. Morais was the land owner - she was one of the Administrators of the estate. Agreement produced A1. That was the agreement entered into. I paid the money to Gopal (Yamkubar) and he paid to Mrs. Morais.

It would appear from this part of his evidence that the entire transaction was carried out by Yamkubar in the absence and on behalf of the plaintiff. But at a later part of his evidence he gave an account of his personal conversation with the defendant. In the ensuing cross-examination he confirmed that he was with Yamkubar at the moment of the transaction. If that be true then the motive or rationale of creating this purported agency appears to be quite meaningless. The plaintiff attempted to untangle this paradoxical point by explaining that as at that time he was living away from Malacca i.e. in Seremban it was quite inconvenient for him to travel frequently to see the defendant, hence the necessity for appointing Yamkubar as an agent. But then such deduction does not stand to reason if one considers that Kuala Sungai Baru, Yamkubar's place of abode, at that time, lay some 29 miles away from Malacca Town and is accessible through less convenient route than the Malacca/Seremban Road. Likewise the plaintiff would have to travel all the way from Seremban to Kuala Sungai Baru to contact Yamkubar who in turn would have to journey to Malacca for the transaction. It would have been simpler, convenient, less expensive and certainly much more effective for the plaintiff to have signed the agreement himself and to deal directly with the defendant rather than transact a complicated sale agreement through a party who resided just as far away from him as he was from the vendors. When questioned further on this unusual arrangement the plaintiff's answer was "I agree Gopal (Yamkubar) was in Kuala Sungai Baru and I was in Seremban at the time of transaction but he communicated with my brother and he (plaintiff's brother) in turn communicated with me". Now I find this explanation just as illogical as the former one. By this arrangement it would appear that the plaintiff had first to communicate to his brother, the brother then contacted Yamkubar and the latter finally contacted the defendant. I cannot understand why the plaintiff had to adopt such a discursive mode of purchasing a land when he could have done so directly through his own brother. The brother unfortunately was not called to explain the purpose of this strange relationship. I find it equally hard to accept the contention that a busy man of the plaintiff's standing would have appointed an ex-labourer and a cowherd who lived far away from him to his agent and it is equally difficult to understand why this simple Indian cowherd should have gone into so much trouble and no doubt expense to act as an unremunerated agent for a Chinese pig rearer.

I also find on the balance of probability the contemporaneous conduct of the plaintiff to be inconsistent with that of a principal. When the defendant intimated his wish to rescind the contract the plaintiff made no representation or assertion of his right as a principal. Letter (Exhibit A4) written by a solicitor made no mention of the plaintiff and neither was anything said about him in the subsequent application for caveat as well as the supporting statutory declaration made by Yamkubar. The claim that plaintiff is a principal and interested party only surfaced much later i.e. a year after the refusal to sell the land and that was made through another solicitor.

I am impressed with the testimony of the defendant whom I found to be more truthful than the plaintiff and for the reasons discussed earlier I accepted his evidence as a more consistent version of what had transpired between the parties. I accept defendant's testimony that the

plaintiff was a total stranger to this land deal and that neither the defendant nor his late mother had met or had any dealings with the plaintiff. I also accede to the view that the plaintiff only came into the picture when Yamkubar had either through lack of pecuniary ability to proceed with a court case or out of desire to acquire a speedier solution approached the plaintiff. The defendant in his evidence had indicated that Yamkubar was a cowherd who was then living in the vicinity of the disputed land and that Yamkubar had been using the land for his own cattle. I accept this unchallenged evidence and infer in all probability that Yamkubar had entered into the agreement in his personal capacity to acquire the land for his own purpose.

It has been said that the earlier words and conduct of parties may impart the evidence of the nature of relationship existing between the parties. In our present case the words of documents and the contemporaneous conduct of the plaintiff and the defendant is sufficient to my mind to lead towards a decisive finding that the agency relationship between the plaintiff and Yamkubar did not exist at all. On the contrary, looking at the dealings between the parties in entirely, I am irresistibly led to the conclusion that the conduct of the plaintiff and Yamkubar is consistent with that of relationship of parties in an assignment of contract.

Having examined the evidence both oral and documentary I am satisfied that the balance of probability in favour of Yamkubar not being the agent of the plaintiff is so great that I ought to, and I do hold, that he was not so. In view of my adverse findings on this first issue the other two favourable issues are no longer of much significance to the plaintiff's case.

Accordingly, this suit is dismissed with costs.

Also found at [1984] 2 CLJ 126